82-982

No.

In the Supreme Court of the United States

October Term, 1982

TRIBUNE PUBLISHING COMPANY d/b/a COLUMBIA DAILY TRIBUNE, and NATE BROWN,

Petitioners,

vs.

SANDRA K. HYDE and CITY OF COLUMBIA, MISSOURI,

Respondents.

PETITION OF TRIBUNE PUBLISHING COMPANY d/b/a COLUMBIA DAILY TRIBUNE, AND NATE BROWN FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the First Amendment forbids the punishment of a newspaper under a tort theory of negligence for its accurate publication of truthful information which has been provided to it by the government?

2. Assuming, *arguendo*, that the First Amendment permits the punishment of a newspaper for accurately publishing truthful information provided to it by the government, whether simple negligence constitutes a permissible standard of liability?

LIST OF PARTIES

The parties to this action include Defendants-Petitioners Tribune Publishing Company[1] d/b/a *Columbia Daily Tribune* and Nate Brown, Plaintiff-Respondent Sandra K. Hyde, and Defendant-Respondent City of Columbia, Missouri.

Walter Potter and the Missourian Publishing Association, Inc. d/b/a *Columbia Missourian*, were also named as defendants in respondent Hyde's petition. Because respondent Hyde did not appeal from the trial court's dismissal of her claims against those parties, however, they are no longer involved in this action.

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1. The Tribune Publishing Company is not wholly owned by or affiliated with any other corporation. Sun Communications, Inc., of Fulton, Missouri, is a wholly-owned subsidiary of the Tribune Publishing Co.

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Petitioners, the Tribune Publishing Company, d/b/a *Columbia Daily Tribune,* and Nate Brown respectfully pray this Honorable Court that a writ of certiorari be issued to review the decision of the Missouri Court of Appeals, Western District, entered in this case on June 15, 1982, and the Order of the Supreme Court of Missouri denying transfer entered September 13, 1982.

OPINION AND ORDERS BELOW

The order of the Circuit Court of Boone County, Missouri, Case No. CV180-1601CC, entered December 24, 1980, is not reported but is reproduced herein at Appendix A. The opinion of the Missouri Court of Appeals, Western District, Case No. WD 32,406, entered June 15, 1982, is reported at 637 S.W.2d 251 and is reproduced herein at Appendix B. The Order of the Missouri Court of Appeals, Western District, in Case No. WD 32,406, entered August 3, 1982, overruling a motion for rehearing and denying transfer to the Supreme Court of Missouri is not reported and is reproduced herein at Appendix C. The Order of the Supreme Court of Missouri in Case No. 64306, entered September 13, 1982, denying application for transfer to that court is not reported and is reproduced herein at Appendix D.

JURISDICTIONAL STATEMENT

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1257(3) (1980) upon the ground that the judgment and opinion of the Missouri Court of Appeals violates the rights of petitioners under the First and Fourteenth Amendments to the Constitution of the United States.

In reversing the dismissal of respondent Hyde's negligence claims against petitioners and remanding the case for trial, the Missouri Court of Appeals held under the authority of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), that petitioners may be found liable for damages under a theory of simple negligence for their truthful and accurate publication of the identity of an assault victim,

information which had been provided petitioners and other members of the press by the local police department. In so holding, the court expressly rejected petitioners' contention that the First and Fourteenth Amendments to the Constitution of the United States prohibit imposition of negligence liability under these circumstances. The court held that the news media have a duty to foresee that an accurate publication of truthful information, which they had lawfully obtained, could be used by a third party to commit an additional crime upon respondent Hyde and that they could be found to be negligent for not suppressing its publication.[2]

Following the court of appeals' denial of their motion for rehearing and/or for transfer to the Missouri Supreme Court, petitioners applied to the Missouri Supreme Court for the transfer of this cause to that court. As one basis for their application for transfer, petitioners contended that the court of appeals had erred in rejecting petitioners' First Amendment challenges to the petition. On September 13, 1982, the Missouri Supreme Court entered an order denying petitioners' application for transfer. That order is reproduced herein at Appendix D. (A-47) Because the Supreme Court of Missouri declined to accept petitioners'

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2. The court stated:

> In sum, the petition comes validly within the culminated constitutional balance struck by *Gertz* [*v. Robert Welch, Inc.*, 418 U.S. 323 (1974)] which allows a private redress against a newspaper for negligent publication of *information* on a theory of fault free from the proof restraints of *New York Times* [*Co. v. Sullivan*, 376 U.S. 254 (1964)].
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> * * *
>
> The petition of the victim-plaintiff taken at most favorable intendment states a cause of action in negligence against the news medium defendants free from the proof constraints of New York Times v. Sullivan [376 U.S. 254 (1964)] as well as any constraints of common law privilege.

(A-21, 27)

application for transfer, the Missouri Court of Appeals, Western District, is the highest court in which a decision could be had. *See, e.g., Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *McCarthy v. Philadelphia Civil Serv. Comm'n*, 424 U.S. 645 (1976); *Douglas v. California*, 372 U.S. 353, 354 n.1 (1963).

The court of appeals' decision rejecting petitioners' First Amendment claims and reinstating respondent Hyde's petition is sufficiently precise[3] and final to be reviewable by this Court. As in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), reversal of the state court's decision on the First Amendment issues will preclude any further litigation of respondent Hyde's claim against petitioners. Although petitioners might ultimately prevail at trial, this would be a hollow victory, for then the decision of the Missouri Court of Appeals would go unreviewed and remain in effect. This would inevitably chill the exercise of First Amendment rights by "leav[ing] the press . . . operating in the shadow of the civil . . . sanctions of a rule of law . . . the constitutionality of which is in serious doubt . . . ." *Cox Broadcasting Corp.*, 420 U.S. at 486.

Nor would reversal of the court of appeals' decision following a judgment for respondent Hyde fully vindicate the important federal rights here at stake. Here, "[t]he duration of a trial is intolerably long when measured by [the] First Amendment clock. Appeal is therefore a clearly inadequate remedy for [petitioners]. If they were forced to wait for appellate review until a final disposition of their case by the [trial] court, their First Amendment

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3. *Cf. Nat'l Broadcasting Co. v. Niemi*, 434 U.S. 1354, 1355-56 (1978) (opinion of Rehnquist, J., in chambers denying application for stay of judgment of state appellate court in part because of the imprecision of the state court's opinion on the First Amendment issues).

rights to timely expression would be irretrievably lost." *In re Halkin*, 598 F.2d 176, 199 (D.C. Cir. 1979). Due to the inevitable chilling effect upon the exercise of First Amendment rights if the decision of the Missouri Court of Appeals is allowed to stand and respondent Hyde permitted to proceed with her claims against petitioners, a refusal to immediately review the decision would seriously erode federal policy.

For these reasons, the opinion and judgment of the Missouri Court of Appeals rejecting petitioners' contention that respondent Hyde's claims are barred by the First and Fourteenth Amendments to the United States Constitution is a final judgment or decree presently reviewable by this Court pursuant to 28 U.S.C. § 1257(3). *Cox Broadcasting Corp.*, 420 U.S. at 482-487.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions which petitioners contend are violated by the judgment and opinion of the Missouri Court of Appeals are the following clauses of the First Amendment to the Constitution of the United States:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . . ."

and the following clause of the Fourteenth Amendment to the Constitution of the United States:

> ". . . nor shall any State deprive any person of life, liberty or property, without due process of law; . . . ."

STATEMENT OF THE CASE

Shortly after midnight on August 20, 1980, respondent Sandra K. Hyde contacted the municipal police department of the City of Columbia, Missouri, and reported that she had been abducted at gunpoint by an unknown assailant near a local night spot but that shortly thereafter she had managed to escape from her assailant's automobile as it turned a corner.[4] (L.F. 1, 32, 33)[5]

This information was recorded by the Columbia Police Department on a standard "Crime Against Persons" report form. (L.F. 1, 32, 33) On the same day, that report was made available to the public by the City of Columbia Police Department. Specifically, that report was provided by the Columbia Police Department to petitioner Nate Brown, a reporter for petitioner Tribune Publishing Company, publisher of the *Columbia Daily Tribune*, the afternoon newspaper of general circulation in Columbia, Missouri, and to Walter Potter, a reporter for Missourian Publishing Association, Inc., a corporation operated by the University of Missouri School of Journalism which publishes the *Columbia Missourian*, the morning newspaper of general circulation in Columbia, Missouri. (L.F. 1)

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4. The facts set forth in the Statement of the Case are drawn from respondent Hyde's petition (L.F. 1-3) and from interrogatory answers and documents produced during the course of pretrial discovery. (L.F. 17-64) The facts relied upon by the Missouri Court of Appeals in its decision below were taken selectively from these sources. (A-32)

5. Under Missouri appellate procedure, the Record on Appeal is divided into two components: the "legal file", consisting of the pleadings and other written portions of the trial record, and the "transcript", consisting of the portions of the trial proceedings not previously reduced to written form. Mo. R. Civ. P. 81.12. Those components will herein be designated "L.F." and "T.", respectively.

In the afternoon on August 20, 1980, the *Columbia Daily Tribune* published a brief account of the incident which included the identity of respondent Hyde obtained from the police report. (L.F. 1) The *Columbia Missourian* published a similarly short article, also identifying respondent Hyde, in its newspaper the following morning, August 21, 1980. (L.F. 1)

Respondent Hyde commenced this action by filing a petition (L.F. 1-3) in the Circuit Court of Boone County, Missouri, in which she claimed that on several occasions following the publication of these articles, she had been threatened by a person whom respondent identifies as her assailant. Respondent Hyde sought to recover damages from petitioners and the other defendants below, claiming that they were negligent for having released her identity to the public while her assailant was still at large. (L.F. 1-3, A-27)

The Circuit Court of Boone County, Missouri, The Honorable Ellen Roper, Judge, sustained motions to dismiss respondent Hyde's petition for failure to state a claim. (A-1) Respondent Hyde then filed an appeal against petitioners and the City of Columbia, Missouri, to the Missouri Court of Appeals, Western District.[6]

On appeal, the Missouri Court of Appeals first addressed the question whether information contained in the police report, specifically respondent's identity, was a "public record" as defined by the Open Meetings Act of Missouri, Mo. Rev. Stat. §§ 610.010-610.120 (1978), a/k/a Missouri's "Sunshine Law". In this regard, the Missouri Court

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6. Respondent Hyde did not appeal the dismissal of her petition as against defendants Walter Potter and Missourian Publishing Ass'n, Inc., presumably for the reason that answers to interrogatories disclosed that the unknown assailant allegedly telephoned and harassed her before the *Columbia Missourian* published her identity in its article on August 21, 1980. (A-32)

of Appeals held "that the name and address of a victim of a crime who can identify an assailant not yet in custody is not a *public record* under the Sunshine Law." (A-16)[7] The court of appeals then held: "In the absence of an obligation imposed by statute, the disclosure of the name and address of the victim-plaintiff [respondent Hyde] by the municipal police department to the reporter [petitioner Brown and Mr. Potter] was *gratuitous.*" *Id.* (emphasis added). The court then stated:

> We determine also that the name and address of an abduction witness who can identify an assailant still at large before arrest is a matter of such trivial public concern compared with the high probability of risk to the victim by their publication, that a news medium owes a duty in such circumstances to use reasonable care not to give likely occasion for a third party [assailant still at large] to do injury to the plaintiff by the publication.

(A-25)

In sustaining respondent Hyde's petition for damages, therefore, the Missouri Court of Appeals ruled that the press could be held liable under a tort theory of negligence for its truthful publication of information lawfully obtained which that court deemed to be of "trivial public concern". (A-25)

The Missouri Court of Appeals overruled petitioners' motion for a rehearing or transfer by it to the Supreme Court of Missouri. (App. C, A-46) Thereafter, the Supreme Court of Missouri denied petitioners' application for a transfer of this case to that court for review. (App. D, A-47)

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7. That the Missouri Court of Appeals erred in its construction of Missouri's "Sunshine Law" is not an issue presented to this Court for review.

REASONS FOR GRANTING THE WRIT

I. The First Amendment Forbids The Punishment Of A Newspaper Under A Tort Theory Of Negligence For Its Accurate Publication Of Truthful Information Which Has Been Provided To It By The Government.

Notwithstanding the protections of the First Amendment to the Constitution of the United States,[8] the Missouri Court of Appeals has held, in effect, that the press has a duty to foresee the possibility that its accurate publication of truthful information provided it by the government may enable a third party to commit an intentional criminal act and that the press must either suppress the publication of such information or be held liable in damages for its "negligent" failure to do so.[9]

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8. The First Amendment applies to the states by operation of the Fourteenth Amendment to the Constitution of the United States. *See, e.g., Edwards v. South Carolina*, 372 U.S. 229, 235 (1963); *Bridges v. California*, 314 U.S. 252, 268 (1941); *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 160 (1939); *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

9. In reaching this conclusion, the Missouri Court of Appeals relied exclusively upon this Court's decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). In *Gertz*, this Court found it to be within the constitutional power of the states to impose civil liability for a defamation "so long as they do not impose liability without fault . . . ." *Id.* at 347. Ignoring the fact that in *Gertz* this Court was concerned with a defamatory falsehood rather than with a truthful statement of fact, the Missouri Court of Appeals cited this statement from *Gertz* for the proposition that "a plaintiff must prove *at least negligence* against the publisher." (A-21) The truth or falsity of the offending statement apparently makes no difference in the eyes of the court below. The court below then held that because respondent Hyde's claim is for negligence, "the petition comes validly within the culminated constitutional balance struck by *Gertz* which allows a private redress against a newspaper for a negligent publication of information on a theory of fault free

(Continued on following page)

For the purpose of this petition, petitioners accept the finding of the Missouri Court of Appeals that the identity of respondent was not a public record under Missouri's "Sunshine Law", Mo. Rev. Stat. §§ 610.010-610.120 (1978), but that this information was "gratuitously" given to both newspaper reporters by the police department of Columbia, Missouri. (A-16) Thus, the factual posture of the issue before this Court is not unlike that considered in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), where this Court found that the defendant newspaper "relied upon

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Footnote continued—

from the proof constraints of *New York Times* [*v. Sullivan*, 376 U.S. 254 (1964)]." (A-21) That the "fault" or negligence standard permitted by *Gertz* applies only to actions involving defamatory falsehoods, and not to actions concerning truthful publications, is evidenced not only by the statement in *Gertz* upon which the court below ostensibly relied but also by other portions of that decision. E.g., "At least this conclusion obtains where, as here, the substance of the *defamatory* statement 'makes substantial danger to reputation apparent.' This phrase places in perspective the conclusion we announce today." *Gertz*, 418 U.S. at 348 (emphasis added). Additional evidence that the court below completely misconstrued the applicability of *Gertz* to a lawsuit involving a truthful publication is the fact that *Gertz* was not cited or otherwise relied upon in the majority opinions of this Court in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977), *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) or *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), all decisions concerned with the accurate publication of truthful information. The utter ludicrousness of the Missouri Court of Appeals' holding is demonstrated by the decision in *Olivia N. v. Nat'l Broadcasting Co.*, 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (1981), where the court considered a similar argument and held:

> Imposing liability on a simple negligence theory here would frustrate vital freedom of speech guarantees. *Gertz v. Robert Welch, Inc.*, (1974) 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789, is also to be distinguished: There the United States Supreme Court recognized the power of the states to impose civil liability for defamation "so long as the States [do] not impose liability without fault." (418 U.S. at p. 339, 94 S. Ct. at p. 3006.) *The holding does not extend more broadly to tort liability for speech in areas outside the law of defamation.*

Id. at 496, 178 Cal. Rptr. at 894 (emphasis added).

routine newspaper reporting techniques to ascertain the identity of the alleged assailant. A free press cannot be made to rely solely upon the sufferance of government to supply it with information." *Id.* at 103-104. The facts in the case at bar are even more compelling for review by this Court than those presented in *Smith;* here, respondent Hyde's identity was disclosed to the public, specifically the press, "gratuitously" by the government. (A-16)

The narrow issue involved in this case is whether a newspaper in Columbia, Missouri, may truthfully publish the identity of someone identified in records voluntarily disclosed to the newspaper's reporter by the local police department. This case does not involve a broad constitutional challenge to the state's power to keep the identity of victims of crimes or witnesses confidential while the suspect is at large or to punish those who secure information about criminal investigations by illegal means and thereafter divulge it. This case does not involve any claimed constitutional right of access by the press to police reports or information regarding criminal acts. Nor does this case challenge the right of a state to restrain or punish a publication which is directed to inciting imminent lawless action within the meaning of *Brandenburg v. Ohio,* 395 U.S. 444 (1969).

The prior decisions of this Court make clear that, regardless of whether a state may deny access to government records and proceedings, the state may not prohibit or punish the truthful publication of information regarding such records or proceedings once that information is obtained by the press unless the substantive evil occasioned by such publication is " 'extremely serious and the degree of imminence extremely high'." *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 845 (1978) (quoting

Bridges v. California, 314 U.S. 252, 263 (1941)).[10] In *Smith v. Daily Mail Publishing Co.*, this Court acknowledged that "state action to punish the publication of truthful information seldom can satisfy constitutional standards." *Id.*, 443 U.S. at 102. *Accord, Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); *Craig v. Harney*, 331 U.S. 367, 374 (1947); *Thornhill v. Alabama*, 310 U.S. 88, 101-102 (1940); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936).

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), where the issue concerned whether a state could impose sanctions in the form of a privacy tort for the accurate publication of the name of a rape victim obtained from public records, this Court stated:

> [T]he First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection.

Id., 420 U.S. at 495. The Missouri Court of Appeals distinguished this Court's opinion in *Cox* on the basis that "*Cox* holds no more than that publication of rape victim name information in a [judicial] record already open to the public does not give a basis for an invasion of privacy suit. . . . *Cox* has nothing to do with extra-judicial reports . . . ." (A-44, at n. 25)

The Missouri Court of Appeals totally misconstrued the holding in *Cox*. It ignored the essential underpinnings of that decision as well as several other decsions of this

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10. Petitioners recognize that the right of the press to print what it learns may be limited by such unique circumstances as those discussed in *New York Times Co. v. United States*, 403 U.S. 713 (1971). Such issues as national security are so far removed from the present context that we believe they need not be considered here.

Court. Among those decisions is *Oklahoma Publishing Co. v. Dist. Court*, 430 U.S. 308 (1977), in which this Court in a *per curiam* opinion unanimously reaffirmed its decision in *Cox* and held that the trial court's order enjoining the publication of a juvenile defendant's name and photograph abridged the freedom of the press guaranteed by the First and Fourteenth Amendments. In doing so, this Court noted that: "There is no evidence that petitioner acquired the information unlawfully or even without the State's implicit approval." *Id.* at 311. The same is also true in the case at bar. Here respondent Hyde not only concedes but affirmatively alleges as the basis for her claim against the City of Columbia, Missouri, that its municipal police department voluntarily disclosed her identity to petitioners. (L.F. 1) Furthermore, the court below found that the municipal police department had done so "gratuitously". (A-16)

This Court's more recent decisions in *Landmark Communications, Inc.*, 435 U.S. 829, and *Smith*, 443 U.S. 97, make clear that *Cox* and the First Amendment protections with which that decision was concerned are not limited to publication of information obtained from "judicial records" or records disclosed in open court. In *Landmark*, the Court struck down a Virginia statute under which Landmark Communications, Inc., the owner of the *Virginia Pilot*, was prosecuted for publishing information concerning the identity of a judge involved in a confidential judicial inquiry proceeding. In doing so, this Court addressed itself solely to the narrow question whether the First Amendment permits the criminal prosecution of the press for publishing truthful information regarding such a proceeding. In concluding that the criminal statute, as applied to Landmark, violated the First Amendment, the Court did not concern itself with how the *Virginia Pilot* learned the identity of the judge being investigated.

In *Smith*, the newspaper had learned the name of an alleged juvenile delinquent by monitering a police band radio frequency and by questioning witnesses, the police and an assistant prosecuting attorney. It then published the juvenile's name in violation of a West Virginia criminal statute. Prosecution of the Daily Mail Publishing Co. upon its indictment under that statute was subsequently held to violate the First Amendment, both by the West Virginia Supreme Court of Appeals and by this Court. With respect to the significance of the source of the information published, this Court stated:

> Here respondents relied upon routine newspaper reporting techniques to ascertain the identity of the alleged assailant. A free press cannot be made to rely solely upon the sufferance of government to supply it with information. If the information is lawfully obtained, as it was here, the state may not punish its publication except when necessary to further an interest more substantial than is present here.

Id., 443 U.S. at 103-104 (citations omitted). In so holding, the Court cited *Oklahoma Publishing Co.*, 430 U.S. 308, for the proposition that "once the truthful information was '*publicly revealed*' or 'in the public domain' the court could not constitutionally restrain its dissemination." *Smith*, 443 U.S. at 103 (emphasis added). Similarly, in *Houchins v. KQED, Inc.*, 438 U.S. 1, 10 (1978), this Court stated: "the government cannot restrain communication of whatever information the media acquire—and which they elect to reveal. Cf. Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 838 (1978)."

In addition to the insignificance accorded by the court below to this Court's decisions in *Cox* and later cases is the court of appeals' characterization of the information published by petitioners as being of "trivial public con-

cern". (A-25) By making such a determination, the court has taken upon itself the role of an editor. That the court plainly cannot do.

> For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility—and civility—on the part of those who exercised the guaranteed freedoms of expression.

Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 124-125 (1973). Similarly, in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974), this Court stated:

> The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper . . . constitute the exercise of editorial control and judgment. It has yet to be demonstrated how government regulation . . . can be exercised consistent with First Amendment guarantees . . . as they have evolved to this time.

See also First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 784-785 (1978).

This reluctance to weigh the value of the content of speech is reflected in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). There, in rejecting the "public interest" test enunciated in *Rosenbloom v. Metromedia, Inc.*, 403 U.S.

29 (1971), this Court implicitly held that the "fault" standard should be applied to the conduct of newsgathering and publication and should not constitute an ad hoc review of the "newsworthiness" of the published statement. In rejecting the "public interest" standard, this Court in *Gertz* stated:

> [I]t would occasion the additional difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address issues of "general or public interest" and which do not—to determine, in the words of Mr. Justice Marshall, "which information is relevant to self-government." Rosenbloom v. Metromedia, Inc., 403 U.S., at 79. We doubt the wisdom of committing this task to the conscience of judges.

Gertz, 418 U.S. at 346.

Yet, in the decision below, the Missouri Court of Appeals conducted such ad hoc balancing in applying a *common law* privilege for the publication of matters of "legitimate public concern". (A-23) After acknowledging that the Missouri Supreme Court has held that a criminal event is a matter of legitimate public concern (A-23), the court selected two pieces of information—the respondent's name and address—which were relevant to and a small part of the full report of the incident in question, and found them to be of "trivial public concern". (A-25) The test applied was not a minimal threshold test of general interest, but an ad hoc, after-the-fact balancing of the degree of public interest in this information against the degree of risk that a third party will injure the plaintiff:

> Whether the interest of a publisher is sufficiently important to give rise to a privilege to protect it against invasion by the publication of defamatory matter con-

> cerning another is akin to whether a duty arises to foresee and protect another against a risk of injury. In each the legal right derives from a preponderant value of the interests in competition.
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> We determine also that the name and address of an abduction witness who can identify an assailant still at large before arrest is a matter of such trivial public concern compared with the high probability of risk to the victim by their publication, that a news medium owes a duty in such circumstances to use reasonable care not to give likely occasion for a third party [assailant still at large] to do injury to the plaintiff by the publication.

(A-23, 25)

By selectively applying the "public interest" test to isolated facts taken from a report of an event of conceded public interest, the court below decided, in effect, whether the isolated facts were of sufficient public interest to be "necessary" or "relevant" to the report of the event. In *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971), this Court rejected the notion that a jury is free to impose civil liability upon one who publishes a fact which the jury feels is not "relevant" to a discussion of public interest.

> A standard of "relevance", . . . especially such a standard applied by a jury under the preponderance-of-the-evidence test, is unlikely to be neutral with respect to the content of speech and holds a real danger of becoming an instrument for the suppression of those "vehement, caustic, and sometimes unpleasantly sharp attacks," New York Times, supra, [376 U.S.] at 270, which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail.

Id. at 276-277.

The First Amendment does not accord the prerogative of censorship of truthful information to a court or jury but preserves that right in the press. Yet, under the opinion below, the press is at the mercy of a court and jury as to whatever it publishes, without regard to its truthfulness or its perceived public significance at the time of publication. It is not for a court or jury to vent their criticism of the press in the guise of a finding that a newspaper was negligent (or did not exercise the proper social concerns) in accurately publishing truthful information. Such a holding would be the death knell of the free press that has been an essential element of our democracy for over 200 years.

II. Assuming, *Arguendo*, That The First Amendment Permits The Punishment Of A Newspaper For Accurately Publishing Truthful Information Given To It By The Government, Simple Negligence Does Not Constitute A Permissible Standard.

In *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), this Court held that "if the information is lawfully obtained, as it was here, the state may not punish its publication except when necessary to further an interest more substantial than is present here." *Id.* at 104. Thus, this Court has apparently left open the possibility that a newspaper's publication of truthful information lawfully obtained may be constitutionally proscribed or punished under certain circumstances. But this Court carefully limited those circumstances; before liability may be imposed, the interests sought to be protected must be far more substantial and in far greater peril than the interests allegedly threatened in the case at bar. "[T]he substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be pun-

ished." *Bridges v. California*, 314 U.S. 252, 263 (1941). "The danger must not be remote or even probable; it must immediately imperil." *Craig v. Harney*, 331 U.S. 367, 376 (1947). *See also Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 845 (1978).

This Court historically has recognized that the state's power to regulate speech is exceedingly narrow in scope and may be exercised only on a showing of grave and immediate danger to interests which the state may lawfully protect. *Herndon v. Lowry*, 301 U.S. 242 (1937). First Amendment protection has been withdrawn only from certain "narrowly limited classes of speech", *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942), such as "obscenity", *Miller v. California*, 413 U.S. 15 (1973), and *Roth v. United States*, 354 U.S. 476 (1957); "fighting words", *Chaplinsky*, 315 U.S. 568 (1942); and "words likely to produce imminent lawless action" (incitement), *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

Here the Missouri Court of Appeals creates a new class of prohibited speech, a class which may include all matters which a judge or jury may find to be of "trivial public concern" when compared with subsequent events. The court below stated:

> We determine also that the name and address of an abduction witness who can identify an assailant still at large before arrest is a matter of such trivial public concern compared with the high probability of risk to the victim by their publication, that a news medium owes a duty in such circumstances to use reasonable care not to give likely occasion for a third party [assailant still at large] to do injury to the plaintiff by the publication. That duty derives as an 'expression of the sum total of those considerations of policy which

> lead the law to say that the particular plaintiff is entitled to protection.' Prosser, The Law of Torts, 325-6 (4th ed. 1971). It derives from a balance of interest between the public right to know and the individual right of personal security—between the social value of the right the press advances and the social value of the right of the individual at risk.

(A-25, 26)

A free press cannot survive under such an elusive, abstract standard. The press could never safely publish any information if it were faced with a subsequent balancing by a judge or jury between the "social value of the right the press advances and the social value of the right of the individual at risk." (A-26) Can this standard be employed to impose liability upon the press because thieves learned from an obituary when a decedent's family would be attending a funeral and therefore away from their home, or that an individual in the community had a valuable art collection?

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), this Court implicitly acknowledged the burden placed on an editor who can be held liable for failing to look beyond the face of the story being considered for publication.[11] If it can be argued that a "fault" requirement fails to meet First Amendment standards where the danger from a misstatement was not readily apparent, certainly the argument is overwhelming that a state can-

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11. As previously noted, in *Gertz* this Court held that the "fault" standard of liability could be applied to defamation of a private person where "the substance of the defamatory statement 'makes substantial danger to reputation apparent.'" *Id.*, 418 U.S. at 348. However, this Court added that: "Our inquiry would involve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential." *Id.*

not impose liability for an editor's alleged miscalculation of the likelihood of criminal misuse of truthful information related to a matter of public interest.

Presumably such an editor would know that he might later be able to persuade a jury that he exercised "due care", but the burden of speculating on unknown facts and the threat of expensive litigation may more often than not freeze even truthful speech which the editor considers to be undoubtedly newsworthy but also controversial and thus capable of inducing some susceptible person to commit a crime.[12]

In virtually every such editorial decision, the economic cost to the publisher of self-censorship is minimal. In fact, he may eschew "hard news" in favor of the innocuous "lifestyle" or "feature" article, which is both less expensive and risk-free. Indeed, there can be no doubt that if all truthful but potentially "dangerous" information were purged from the news, it would fundamentally change the essential nature of news in this country.

With respect to the state regulation of *conduct*, this Court may find it entirely appropriate for a state to impose on its citizens a burden of foreseeing criminal acts. The same standard applied to *speech*, however, would be an impermissible infringement on First Amendment rights.[13]

The distinction between the regulation of conduct and speech has long been recognized by this Court. The court

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12. "I fear that it may well be the reasonable man who refrains from speaking." *Gertz*, 418 U.S. at 360 (Douglas, J., dissenting).

13. "The jury is a peculiarly majoritarian institution. It brings the voice of society at large into the courtroom. For a jury to decide what a person may do is one thing; for it in the context of libel or any other manner to determine what a person may say is quite another." R. Sack, *Libel, Slander, and Related Problems*, 579, 580 (1980).

below imposes "sanctions on pure expression—the content of a publication—and not conduct or a combination of speech and nonspeech elements that might otherwise be open to regulation or prohibition. See United States v. O'Brien, 391 U.S. 367 (1968)." *Cox Broadcasting Corp.*, 420 U.S. at 495.

The interest of the state in protecting the victim of a crime from the speculative possibility of a future criminal act is certainly no greater than the government's interest in protecting the anonymity of a rape victim, *Cox Broadcasting Corp.*, 420 U.S. 469; the anonymity of a youth charged as a juvenile offender, *Oklahoma Publishing Co. v. Dist. Court*, 430 U.S. 308 (1977) and *Smith*, 443 U.S. 97; confidential proceedings of a judicial inquiry and review commission, *Landmark Communications, Inc.*, 435 U.S. 829; a classified study concerning the history of governmental policy in Vietnam, *New York Times Co. v. United States*, 403 U.S. 713 (1971); and information tending to show the guilt of a defendant in an impending criminal trial, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). In each of these cases the certainty of harm is far less speculative than in the present case. Yet in each of these cases this Court held that the interests of the government must be subservient to the constitutional guarantees of the First Amendment.

In striking a balance of the social values involved in favor of a negligence standard, the court below stated: "The petition is in negligence. It is the *likelihood* of injury to another that gives rise to the duty to exercise due care" either to suppress the news or be held liable in negligence for the consequences. (A-27, emphasis added) Long ago, however, this Court recognized that there must be something more than a "likelihood" that an evil will result from the publication of truthful infor-

mation before the freedoms of speech and press can constitutionally be restrained or punished. In *Thornhill v. Alabama*, 310 U.S. 88, 104 (1940), this Court stated:

> Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests.

Similarly, in *Bridges*, this Court concluded: "[T]he *likelihood*, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press." *Id.*, 314 U.S. at 262 (emphasis added).

This proposition was recently reaffirmed in a very different context, one which—if anything—has historically been accorded far less First Amendment protection. In *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), this Court noted, in reviewing the protections afforded commercial speech, that the state may not "completely suppress the dissemination of concededly truthful information about entirely lawful activity, *fearful of that information's effect upon its disseminators and its recipients.*" *Id.* at 773 (emphasis added).

These holdings should be reaffirmed especially where, as here, the interests sought to be protected can be achieved by alternative means, such as imposing the duty where it properly belongs—upon the government. Had a statute or prior judicial determination existed which constitutionally proscribed the release of the information here at issue, the state's interest would have been pre-

served without any infringement upon the First Amendment or the press. The choice between the alternatives of infringing upon constitutional liberties and achieving a lawful end by other means has already been determined.

> [T]he choice among these alternative approaches is not ours to make or the Virginia General Assembly's. *It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of misuse if it is freely available, that the First Amendment makes for us.*

Virginia State Bd. of Pharmacy, 425 U.S. at 770 (emphasis added). *See also Kusper v. Pontikes*, 414 U.S. 51, 59 (1973).

Negligence is not a standard which is constitutionally compatible with the right of a free press to publish truthful information which it lawfully obtains. This theory of tort liability would inextricably intertwine the court with the decision-making processes of the press. Such an encroachment upon the freedoms preserved to this time would stifle the free flow of newsworthy information upon which our citizenry and its government ultimately depend. Alternatives exist which adequately protect the interests of the state and, as this Court has repeatedly recognized, the Constitution demands nothing less than that the state choose those alternatives.[14]

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14. In fact, the decision below would appear to accomplish the desired objective by alternative means. The court below not only declared that the information here at issue should be regarded as confidential under Missouri's "Sunshine Law" but further stated that: "[t]he municipal police department, however, was bound to observe the structures of the [Sunshine Law] and did not enjoy the same superseding constitutional favor the First Amendment accords the news media." (A-40, n.19)

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the issues raised herein relate to the heart of the First Amendment to the Constitution of the United States. The questions presented by this petition are indeed substantial. We therefore respectfully urge this Court to note probable jurisdiction and set this case down for argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sam L. Colville, a member of the Bar of the United States Supreme Court, hereby certify that 3 true copies of the Petition for Writ of Certiorari were served pursuant to Supreme Court Rule 28.3 by mailing same through the United States Postal Service, First Class mail postage prepaid, on this 10th day of December, 1982, upon the following:

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